

STATE OF MICHIGAN
COURT OF APPEALS

WANDA LOUISE PORTER,

Plaintiff-Appellee,

v

MICHAEL P. PORTER,

Defendant-Appellant.

UNPUBLISHED

September 14, 2006

No. 260537

Missaukee Circuit Court

LC No. 03-005675-DO

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, claiming that the trial court erroneously classified separate property as marital property. We affirm.

The parties married on June 10, 1967, and plaintiff filed this action for divorce on June 20, 2003. At issue in this case is the property division, particularly with respect to a cottage. Defendant's father deeded the cottage to defendant and his brother as a gift to them in 1985.¹ The parties co-signed on a mortgage against the cottage in 1992 and on a subsequent mortgage in 1996. The parties used the proceeds from the latter mortgage to purchase defendant's brother's interest in the cottage. Sometime near the beginning of 2003 defendant executed a quitclaim deed conveying the cottage from himself to himself and plaintiff.

Defendant argues that the cottage is a separate asset given to him during the marriage and that the trial court erred in awarding plaintiff one-half interest in the cottage.² We review for clear error a trial court's findings of fact regarding whether a particular asset qualifies as marital or separate property. See *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). Findings of fact are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992). This Court gives special deference to a trial court's factual findings that were

¹ Plaintiff was not named in the deed.

² Defendant concedes, however, that plaintiff is entitled to a portion of the equity in the cottage.

based on witness credibility. *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

A “trial court’s first consideration when dividing property in divorce proceedings is the determination of marital and separate assets.” *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Marital assets are those that came “to either party by reason of the marriage . . .” MCL 552.19. Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded. *McNamara, supra* at 183. A court has discretion, however, to include property acquired by gift or inheritance in the marital estate if the otherwise separate property was commingled with the marital property or used for joint purposes. *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976). An appellate court should consider the intent of the parties when separate property is commingled for joint purposes during the course of the marriage. See, e.g., *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951).

Here, the trial court found that the cottage undoubtedly became part of the marital estate when defendant conveyed the cottage to plaintiff through a quitclaim deed during the marriage. Plaintiff also testified and defendant did not dispute that she twice co-signed on a mortgage against the cottage and that the second mortgage payments were paid with marital funds. Under these circumstances, the trial court did not clearly err in finding that the cottage was a marital asset. See *Charlton, supra* at 94.

In a related argument, defendant argues that he should be given credit for a portion of the cottage’s appreciation in value from 1985 to 1996 as a separate asset because plaintiff did not contribute to the appreciation in value during this time. He contends that plaintiff did nothing to contribute to the appreciation in value until 1996 when she co-signed for the 1996 mortgage. We disagree because there is evidence that plaintiff contributed to the appreciation in the value of the cottage over the relevant time period.

If property increases in value over the course of a marriage and the increase is not merely the result of passiveness, the resulting appreciation in value is part of the marital estate. See *Reeves, supra* at 495-497. While not referring to a specific time frame, defendant admits that plaintiff cleaned the cottage and was involved in maintaining the property. Plaintiff testified that sometime in the 1980’s she made curtains for the cottage’s 13 windows and purchased the materials to do so. Plaintiff also testified that the parties received income from their jointly titled oil well monthly from 1985 through 2003 and that this income was used to pay expenses for their home in the city of Midland³ and to periodically pay cottage expenses. The appreciation in value from 1985 to 1996 was not merely passive but resulted from the parties’ joint income used to pay cottage expenses and the efforts of both parties in improving the cottage. Thus, the appreciation in value during this time period is part of the marital estate.

Defendant next argues that the trial court abused its discretion by not valuing the cottage as of the date the divorce complaint was filed. A trial court’s decision regarding the time for

³ The parties sold the Midland home in 2000.

valuation of a marital asset in a divorce action is within its discretion. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). For purposes of dividing property, marital assets are typically valued at time of trial or when the divorce judgment is entered, though the court may, in its discretion, use a different date. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997).

Defendant's reliance on *Byington* in support of his argument is misplaced. Contrary to defendant's assertion, *Byington* does not state that a trial court should consider the point at which the parties' manifest an intent to lead separate lives for purposes of determining a proper valuation date. Because the trial court chose the time of trial as the valuation date, and defendant has not articulated an appropriate rationale for doing otherwise, we conclude that the court did not abuse its discretion in setting the valuation date. See *Byington, supra* at 114 n 4.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell